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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 700

JACK HAZELCORN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 578 Misc.

ROBERT WHITE, a/k/a ROBERT RANDALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 533–539; Pet. App. 22–28) is reported at 218 F. 2d 145.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1954 (R. 540), and peti-

tions for rehearings were denied on February 18, 1955 (No. 700 R. 541–545; No. 578 Misc. R. 541–544). Mr. Justice Black extended the time for filing petitions for writs for certiorari until April 4, 1955, on which date the petitions were filed. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

In No. 700:

1. Whether an F. B. I. agent had reasonable grounds for believing that petitioner had committed a felony, so that his arrest without a warrant and the incidental search of his person were legal.

2. Whether the court's charge adequately withdrew from the jury's consideration, as evidence against petitioner, statements made by two co-conspirators after termination of the conspiracy.

In No. 578 Misc.:

1. Whether an instruction regarding inferences of guilt from possession of recently stolen property limited explanation of legal possession to possible testimony by petitioner himself.

2. Whether remarks in a prosecutor's closing argument were prejudicial as referring to petitioner's failure to testify in his own defense.

STATUTES INVOLVED

18 U. S. C. 2312, 62 Stat. 806, provides:

> Whoever transports in interstate or foreign commerce a motor vehicle * * *, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U. S. C. 3052, 64 Stat. 1239, provides:

> The Director * * * and agents of the Federal Bureau of Investigation of the Department of Justice may * * * make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.

STATEMENT

Petitioners were both convicted on two counts charging conspiracy to transport a stolen automobile in interstate commerce from New York to Florida, and to transport it in foreign commerce from Florida to Cuba. Randall, the petitioner in No. 578 Misc.,[1] was also convicted of the substantive offenses. Each of the petitioners was sentenced to two years on each count on which he was convicted, the sentences to run concurrently

[1] We shall refer to this petitioner by his real name, Randall, since that is how he was called in the court below, even though his present petition for certiorari is captioned Robert A. White, a/k/a Robert Randall.

(R. 2–6, 12–13, 35–36).[2] On appeal, the judgments were affirmed (R. 540).

Pertinent evidence adduced at the trial may be summarized as follows:

On March 30, 1953, a 1952 Cadillac automobile, which had been leased by a Detroit auto rental agency to one Weatherby, was stolen from the vicinity of 82d Street and East End Avenue in New York City (R. 69, 78, 80–83).

On April 3, 1953, the three defendants, with Hazelcorn using the alias Parker and Randall using the alias White, attempted to sell this Cadillac to a Miami automobile dealer named Molho (R. 100–102). The motor number of the car had been changed and the registration of ownership in the name of White had been forged (R. 108–109, 203–204). The car dealer told Brodsky, a Miami Beach policeman, that the automobile was "hot" and that he would have to call the police (R. 109). White (Randall) asked what would happen if the police came, and the dealer replied that the car would be taken away from him if it were stolen. Parker (Hazelcorn) suggested that if they went back to New York they might find the man, whose name they did not know, from whom they had bought the car. (R.

[2] A third defendant, Brodsky, was convicted of the conspiracy and substantive offenses relating to the transportation in foreign commerce and was sentenced to imprisonment for two years (R. 11, 41).

110, 111, 131–132.) The three men drove the car away before the police arrived (R. 109–110).

On April 6, there was sent to Brodsky from Brooklyn, New York, a telegram reading, "Mother ill. Can you come? Allan Brodsky, 7017 20th Avenue, Brooklyn, New York" (R. 327). Brodsky's mother testified at the trial that she did not know an Allan Brodsky, that she had nothing to do with sending the telegram, and that her health was good at that time (R. 334–335). Brodsky, relying upon his mother's spurious illness, did not work as a policeman on April 7, 8, and 9 (R. 317).

On April 6, Brodsky in his police uniform and Randall, posing as White, the purported registered owner of the Cadillac, sailed for Havana after a customs officer had approved the shipment of the car (R. 139–143, 177-178).[3]

Meanwhile, on the evening of April 3, the Miami Police Department had received a message to pick up Robert White and Jack Parker as suspects in the theft of the Cadillac (R. 306–307, 312). On April 10 at about 6:45 p. m., F. B. I. agents arrested Brodsky and Randall when they arrived at Miami on a plane coming from Cuba (R. 250).

At that time, Brodsky told F. B. I. agent Bailey that he had known Randall a number of years, and that Randall had said that he some-

[3] The stolen car was returned to Miami from Cuba on April 15, 1953 (R. 261–262).

times went under the name White (R. 258). Randall informed the agent that he had bought the Cadillac for $2,800 from a man named Charley in New York;[4] that he and Hazelcorn had "left New York with the automobile about April 1"; and that he had registered in the Seacomber Hotel in Miami as White, Hazelcorn as Parker (R. 259–261).

The circumstances of Hazelcorn's arrest in New York on April 10 are set forth in the Argument, *infra.*

ARGUMENT

I

No. 700

1. Petitioner Hazelcorn attacks on several grounds the validity of his arrest, and the search incident thereto. The circumstances were as follows:

In New York, on April 10, at about 8 p. m., two F. B. I. agents (Dyer and Van Lewen) went to the home of petitioner in Brooklyn to make an investigation (R. 346, 353, 361). At that time agent Dyer had received information that a phone call had been made from Havana, Cuba, to petitioner's residence, and that a money order had been sent in the name of his wife, Doris Hazelcorn, to Bob White in Havana (R. 353). The agent also knew that the Cadillac had been stolen

[4] Randall's wife gave testimony at the trial to this effect (R. 432–434).

and that there was a forged registration for it, although he did not know about petitioner's connection with the car (R. 360).

When petitioner arrived home at about 8:30 p. m., Dyer stated he wanted to talk to him at the F. B. I. office in connection with an official investigation. After petitioner said, "Well, can't we talk here?", Dyer explained that he had his files at the office. According to Dyer, petitioner voluntarily went along with him to the office (R. 353–354, 355).[5] At about 9:45 or 10:00 p. m., agent Dyer telephoned agent Bailey in Miami, stating that petitioner refused to answer any questions. Bailey told Dyer that Randall had already admitted that petitioner rode with him in the car to Florida, and that he (Bailey) was going to present the case to the United States Attorney for prosecution and call Dyer back (R. 357). Dyer understood that he was to hold petitioner until the return call (R. 358–359). When Bailey called back, he stated that, after presenting the matter to the United States Attorney, the latter had authorized filing of a complaint against petitioner (R. 359). Thereupon, Dyer placed petitioner under arrest, searched him, and took from him Government

[5] Petitioner testified on the hearing on the motion to suppress in the absence of the jury that he did not go voluntarily to the F. B. I. office and that he considered himself under arrest (R. 364).

Exhibits No. 29 (a copy of the telegram sent to Brodsky about his mother's being ill), No. 30 (a Seacomber Hotel, Miami, courtesy card, dated April 3), and No. 31 (an address of Albert's Motel in Miami, Florida). These exhibits were received in evidence over petitioner's objections, the court stating, in overruling a motion to suppress, that the arrest and therefore the search were lawful. (R. 349, 359, 365, 366–369.) The formal complaint and warrant of arrest against petitioner were issued on April 11, the day after the arrest by Dyer (R. 365).

a. Petitioner first argues that under 18 U. S. C. 3052, the F. B. I. agents had no authority to arrest him without a warrant in the absence of an emergency, even though they had probable cause to believe that he had committed a felony. However, as petitioner himself states (Pet. 10), the statute was amended in 1951, following the decision in *United States* v. *Coplon,* 191 F. 2d 749 (C. A. 2), certiorari denied, 342 U. S. 926, to eliminate the former proviso that arrests without a warrant could be made only if there was a likelihood of an escape before a warrant could be obtained. By the amendment, F. B. I. agents were given the same rights to make arrests as police officers generally have. This includes, in the statute's words, the right to arrest without a warrant upon "reasonable grounds to believe that the person to be arrested has committed" a felony. See *Carroll* v. *United States,* 267 U. S.

132, 156–7; *Trupiano* v. *United States,* 334 U. S. 699, 704.

b. He also contends (Pet. 14–15) that he was actually arrested when he was first asked to accompany the agents to the F. B. I. office, and certainly by the time Dyer decided to "hold" him pending a return call from agent Bailey in Miami. There was substantial testimony that petitioner voluntarily accompanied the F. B. I. agents to the office and that he was not under arrest at such time. But even if the initial action in requesting petitioner to come to the office could be considered an illegal detention, no search was made and no information leading to his subsequent arrest was supplied by petitioner. Consequently, even if there was an original illegal arrest, it may be disregarded as irrelevant; no "fruits" were obtained by such action. The search did not take place until later, after a lawful arrest.

c. Whether that arrest be deemed to have occurred when Dyer held petitioner after the first telephone call or when he formally arrested him after the second is immaterial since, at either time, Dyer clearly had reasonable grounds to arrest petitioner. Before the first telephone call Dyer knew that a car had been stolen and that there was a forged registration for it; that a telephone call had been made from Havana to petitioner's residence; that a money order had been sent in the name of petitioner's wife to Bob White in Havana (R. 353, 360). As a re-

sult of the telephone call, he learned that petitioner had driven with Randall (White) in the car to Florida (R. 357). The second telephone call to the effect that the United States Attorney had authorized the issuance of a complaint (R. 359) was a confirmation that in his judgment the known facts established probable cause to believe that petitioner had committed a felony. This conclusion was supported by the facts then available. Cf. *Brinegar* v. *United States,* 338 U. S. 160; *Brubaker v. United States,* 183 F. 2d 894, 897 (C. A. 6); *Mueller* v. *Powell,* 203 F. 2d 797, 802 (C. A. 8); *United States* v. *Bell,* 48 F. Supp. 986 (S. D. Cal.). Dyer, the arresting agent, could rely upon the summary information received from his fellow agent in Miami (*United States* v. *Bianco,* 189 F. 2d 716, 719 (C. A. 3)), even though some of the information the arresting agent had was hearsay. *United States* v. *Li Fat Tong,* 152 F. 2d 650, 652 (C. A. 2). And since the arrest was lawful, so also was the search of petitioner's person incident thereto. *United States* v. *Rabinowitz,* 339 U. S. 56, 60.

2. Petitioner urges that the trial court erred in admitting in evidence statements of his coconspirators Randall and Brodsky after the conspiracy had ended, and in failing to give adequate withdrawal instructions to the jury in regard to these statements (Pet. 15–19).

This question arises in the following context. Over petitioner's objections, agent Bailey was

permitted to testify at the trial as to admissions made by Randall and Brodsky after their arrest on April 10, 1953 (R. 257). Brodsky admitted his presence with the other two defendants at Miami on April 3 in connection with the attempted sale of the Cadillac (R. 257–258); Randall admitted that he had obtained the registration of the car in the name of Robert White, that he and petitioner had left New York about April 1 and that he had acquired the car about two days before that, and that petitioner had registered as Jack Parker at the Seacomber Hotel with him at a time when he (Randall) used the alias White (R. 260–261).

In its final charge to the jury regarding count 4 (the first conspiracy count), the court instructed as follows (R. 505–506):

> In this connection the Court wishes to at this time instruct the jury on the issue of whether [petitioner] was guilty of the conspiracy charged, that you should disregard and accord no probative force to the testimony of the Government witness Bailey that the accused Randall made a statement to him, Bailey, that [petitioner] accompanied him, Randall, on the trip from New York to Miami, since it is the law that acts and declarations of co-conspirators are not admissible against the other members of the conspiracy after the termination of the conspiracy itself.

> In other words, the jury could not consider the testimony upon the issue of whether there was in fact a conspiracy between Randall and [petitioner] or whether there was an overt act in pursuance of such conspiracy since the conspiracy, if any there was, was terminated when the defendant Randall was arrested and the object of the conspiracy, if any, was thereby necessarily terminated; * * *.

Also in the final charge the court instructed regarding count 6 (the second conspiracy count) (R. 511):

> The Court instructs you that such testimony of the Government witness Bailey as bears upon statements made by the defendant Brodsky and the defendant Randall at the time of their arrest the jury would not be authorized to, and you are instructed not to, consider or give any probative force to any statement made by either of said accused to the witness Bailey in the absence of the other accused, either on the substantive offense charged in Count 3 or the conspiracy charge in Count 6.

In the circumstances of this case, this charge adequately instructed the jury not to consider the admissions by Brodsky and Randall in relation to petitioner. Cf. *Pennsylvania Co.* v. *Roy,* 102 U. S. 451, 458–459; *Hopt* v. *Utah,* 120 U. S. 430, 438; *Metzler* v. *United States,* 64 F. 2d 203, 207–208 (C. A. 9). Although the charge referred

specifically only to the admission by Randall that petitioner had accompanied him on the trip in the Cadillac from New York to Miami (the most damaging admission against petitioner), it was not an indispensable requirement that all other admissions be mentioned. The charge as a whole emphatically told the jury that any admissions by Brodsky and Randall after their arrest and termination of the conspiracy were not evidence against petitioner. Indeed petitioner's attorney, at the conclusion of the court's charge, did not raise the objections now advanced (R. 518–520), and was presumably satisfied with the charge. See Rule 30, F. R. Crim. P. In *Krulewitch* v. *United States,* 336 U. S. 440 (relied on at Pet. 15–16), there was no withdrawal instruction to cure the error in admitting a statement by a co-conspirator against the accused made long after the termination of the conspiracy.

There was evidence, other than these admissions, from which the jury could properly have inferred—and in all probability did infer—petitioner's guilt under the conspiracy counts. His presence in Miami was proved by the Seacomber Hotel courtesy card and the car dealer Molho's testimony, which also showed his participation in the conspiracy. Molho said that petitioner, using the alias Parker, was present when the three defendants tried to sell him the stolen Cadillac, and that after being informed that the

car was "hot", petitioner said that "if they went back to New York with the car they might find the man from whom they bought it" (R. 100–102, 110, 111). There was also the spurious telegram to Brodsky, which the jury could infer petitioner had sent from Brooklyn, indicating active assistance to the others beyond mere association with them. In the face of this evidence and the judge's clear withdrawal charge, petitioner cannot complain about the admissions.

II

No. 578 Misc.

1. Over objection of petitioner Randall (R. 519–520), the judge gave the following instruction (R. 507):

> * * * it is a rule of evidence that where one is found in possession of recently stolen property, the jury may infer as a matter of fact that the possessor is the thief unless he gives a reasonable and credible explanation of his possession, but if such explanation is sufficient to raise a reasonable doubt, then the inference of guilt is overcome.

Petitioner argues that this instruction erroneously led the jurors to believe that an explanation of legal possession had to come only from petitioner himself, and that they were precluded from considering any other evidence in the case tending to show legal possession (Pet. 8–9). This

contention is negated by the part of the charge immediately after that challenged (R. 507):

> The jury will recall the statement attributed to [petitioner] by the Government witness Molho to the effect that he [petitioner] had purchased the automobile in New York for the price of $2,800.00. You also have before you the testimony of the wife of [petitioner] in explanation of [petitioner's] possession of the automobile to the effect that [petitioner] purchased the automobile from Charlie for the price of $2,800.00. Of course if the jury believe the testimony of Mrs. Randall to be true, then [petitioner] could not be guilty of any offense, nor could either of the other defendants be guilty.[6]

The jurors, moreover, were instructed to weigh the testimony of "all the witnesses" (R. 508), and consider "all the evidence" in the case (R. 515, 516).

2. In his closing argument the government prosecutor referred to defendant Brodsky's being absent from the police force without leave, the sending of the spurious telegram about his mother's illness in New York, and his going to Havana after things got "pretty hot" in Miami

[6] See, also, the part of the charge (R. 511–512) where the jury were told that if they believed petitioner's explanation to Molho as to possession of the car and the testimony of petitioner's wife were not true, they could consider this in connection with the possible inference of guilt arising out of possession of recently stolen property.

(R. 496). The prosecutor continued (R. 496–497):

> The character references here say his character is good, but if his character is good how does he explain what he was doing there? No explanation for these activities has been offered and under the law the defendant is not required to come in here and testify, but from other sources we have no explanation and I don't think we will ever get an explanation.

Defendant Brodsky's motion for a mistrial, in which motion petitioner joined, was overruled (R. 497–499).

Petitioner contends that the prosecutor's remarks, in alluding to his failure to take the stand, constituted prejudicial error (Pet. 9–10). But, taken as a whole, this was not a comment on a defendant's failure to testify but, rather, an observation on the total lack of pertinent defense. And, in any event, there was no derogatory reference in this closing argument to petitioner's failure to take the stand, since the prosecutor was speaking not about him, but about defendant Brodsky. The part of the prosecutor's remarks about there having been no explanation from "other sources" was certainly not improper, since it plainly did not refer to the failure of an accused to testify. Cf. *Gargotta* v. *United States,* 77 F. 2d 977, 978 (C. A. 8); *Rinella* v. *United States,* 60 F. 2d 216, 218 (C. A. 7).

Moreover, the judge in his final charge gave comprehensive instructions (R. 513–514) to the effect that all the defendants had a legal right to testify or not, as they chose, and that their failure to testify could not be considered as evidence of guilt or weigh against the presumption of innocence. Cf. *Baker* v. *United States,* 115 F. 2d 533, 544 (C. A. 8), certiorari denied, 312 U. S. 692.

CONCLUSION

It is respectfully submitted that the petitions for writs of certiorari should be denied.

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